ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION IV

CACR06-773

APRIL 11, 2007

JOHN VAN METER APPELLANT	APPEAL FROM THE SEBASTIAN COUNTY CIRCUIT COURT [NO. CR-97-423]
V.	HON. J. MICHAEL FITZHUGH, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

Appellant John Van Meter appeals the Sebastian County Circuit Court's revocation of his suspended sentence on a first-degree battery nolo contendere plea. On appeal, he argues that the circuit court erred both in revoking his suspended sentence and denying his motion for a new revocation hearing. We affirm.

Appellant pleaded nolo contendere to a charge of first-degree battery in Sebastian County Circuit Court on November 25, 1998, for which he received a ten-year suspended sentence. On December 19, 2005, a petition to revoke appellant's suspended sentence was filed, alleging that on December 4, 2005, he committed aggravated assault, terroristic threatening, and possession of a firearm in violation of his suspended sentence. The petition stated that appellant had noticed two strangers on his father-in-law's property that he believed were not authorized to be there, and that he went onto the property with two other individuals to attempt to force the strangers to vacate the property.

A hearing on the petition was held on February 22, 2006, and the circuit court revoked appellant's suspended sentence and sentenced him to six years' imprisonment in the Arkansas Department of Correction and fourteen years' suspended sentence. Appellant thereafter retained new counsel and filed a motion for a new revocation hearing on March 28, 2006, accompanied by affidavits by certain witnesses who allegedly had valuable information regarding the incident but were unable to testify at the original hearing. The circuit court denied the motion pursuant to an order entered on April 6, 2006, but he did set aside the judgment pursuant to Ark. R. Crim. P. 37.4, and entered a new judgment and commitment order on April 14, 2006, revoking the suspended sentence and sentencing appellant to three years' imprisonment and seventeen years' suspended sentence. Appellant filed a timely notice of appeal on May 4, 2006.

I. Grounds for Revocation

To revoke probation or a suspension, the circuit court must find by a preponderance of the evidence that the defendant inexcusably violated a condition of that probation or suspension. *Stultz v. State*, 92 Ark. App. 204, 212 S.W.3d 42 (2005); *see also* Ark. Code Ann. § 5-4-309(d). The State bears the burden of proof, but need only prove that the defendant committed one violation of the conditions. *Richardson v. State*, 85 Ark. App. 347, 157 S.W.3d 536 (2004). We do not reverse a circuit court's findings on appeal unless they are clearly against the preponderance of the evidence. *Sisk v. State*, 81 Ark. App. 276, 101 S.W.3d 248 (2003). When appealing a revocation, the appellant has the burden of showing that the circuit court's findings are clearly against the preponderance of the evidence. *Rudd v. State*, 76 Ark.

App. 121, 61 S.W.3d 885 (2001). Evidence that is insufficient for a criminal conviction may be sufficient for the revocation of probation or suspended sentence. *Id.* In determining where the preponderance of the evidence lies, we defer to the circuit judge's superior opportunity to determine the credibility and weight of the testimony. *Jones v. State*, 355 Ark. 630, 144 S.W.3d 254 (2004).

The petition to revoke appellant's suspended sentence alleged that on December 4, 2005, he committed aggravated assault, terroristic threatening, and possession of a firearm in violation of his suspended sentence, any of which would violate the conditions of his probation which state in pertinent part that he shall not "violate any federal, state, or municipal law" or "possess or use any firearm." A person commits aggravated assault if "under circumstances manifesting extreme indifference to the value of human life, he or she purposely: . . . [d]isplays a firearm in such a manner that creates substantial danger of death or serious physical injury to another person." Ark. Code Ann. § 5-13-204(a)(2). The statute does not require the actual use of the weapon, merely a purposeful display of a weapon in such a manner that creates a substantial danger of death or serious physical injury to another person.

Although appellant denied possessing or displaying a firearm on the day in question, Tillman McClendon, one of the "strangers" on the property, testified that, on or about December 4, 2005, he and a friend were looking for artifacts on appellant's father-in-law's property. McClendon testified that they had permission to be there, but nevertheless, they heard gunshots followed by appellant chasing McClendon and telling him, "stop or I'll

shoot." McClendon testified that when he stopped running, he saw appellant had a weapon, a 30-30 rifle, and then appellant ordered him to his knees and knocked the air rifle out of his hands. McClendon explained that appellant looked "crazy, strung out, drugged out, something like something out of a movie, absolutely nuts," and that he "felt like . . . [the appellant] may kill me."

In *Schwede v. State*, 49 Ark. App. 87, 896 S.W.2d 454 (1995), this court affirmed a conviction of aggravated assault where the defendant made a threatening statement, pointed a pistol at the victims, and cocked the hammer. Appellant's acts in this incident were similar, and viewing McClendon's testimony in the light most favorable to the State, there was sufficient evidence to support the revocation of suspended sentence for committing aggravated assault.

Alternatively, in order to revoke on the felon in possession of a firearm allegation, the State needed only to prove that appellant possessed a firearm and that he was a convicted felon. *See* Ark. Code Ann. § 5-73-103(a)(1). Appellant does not contest his status as a felon, rather he challenges the State's evidence that he possessed a firearm. He contends that it was his friend Jason Ellenberger, who was with him that day, that had a gun, either a 30-30 Winchester or a 30-30 Marlin. Mart Hurst, the other individual on the property with McClendon, testified that, although he was separated from McClendon during the initial encounter with appellant, he also heard gunshots. However, Hurst stated that when he walked upon the others he did not personally see appellant with a gun. Deputy Alan Marx investigated the incident and testified that he went to appellant's residence within an hour

after arresting him. After receiving permission to search the residence, Deputy Marx explained that he was unable to locate the weapon in question. Appellant's friend and neighbor, Shannon Jachera, was also present at the incident, and she corroborated appellant's contention that he did not have a weapon that day, as did appellant's wife, Lana Van Meter.

While McClendon was the only individual that affirmatively testified that appellant possessed a firearm during the incident, contrary to the testimony of the other witnesses, we must defer to the superior position of the circuit court on the issue of witness credibility. *Holloway v. State*, 363 Ark. 254, 213 S.W.3d 633 (2005). The circuit judge believed McClendon and Hurst rather than appellant, noting that appellant's testimony was "just not logical." He specifically found that the State had proved its case on this allegation by a preponderance of the evidence, which is sufficient to support the revocation.

As to the final condition listed in the petition for revocation, a person commits second-degree terroristic threatening, if "with the purpose of terrorizing another person, the person threatens to cause physical injury or property damage to another person." Ark. Code Ann. § 5-13-301(b)(1). Appellant does not contest this charge, contending only that he never had a gun in his possession during the incident. Possession of a weapon is not an element of this charge, which requires merely a threat of physical injury to another person with the purpose of terrorizing the person.

As previously stated, McClendon specifically testified that appellant chased him while ordering him to stop or he would shoot. Additionally, McClendon explained that when appellant caught up to him, he drew his weapon and ordered, "don't f%*#ing move" while

forcing McClendon to his knees and holding the gun on him. McClendon also explained that appellant warned him never to return to the property and stated, "I have [twelve] prior felonies and an attempt to murder charge." McClendon and Hurst both testified that appellant told them to "call me the mother f*&^er," a phrase apparently intended to inspire fear, and informed the two men that they should not be on the property and did not need to be "messing with them." While not challenged by appellant, this evidence is sufficient to support the revocation of the suspended sentence on the ground of terroristic threatening.

As previously stated, only one violation of a condition of appellant's suspended sentence was required to be proven by the State. Here, sufficient evidence was presented to support the revocation on any one of the three allegations set forth by the State in its petition to revoke, each of which were conditions of appellant's suspended sentence. Accordingly, we affirm on this point.

II. Denial of Motion for a New Revocation Hearing

Following the revocation hearing, appellant filed a motion for a new revocation hearing pursuant to Ark. R. Crim. P. 33.3, contending that four witnesses had valuable information to present that would show conclusively that appellant had not violated the terms and conditions of his suspended sentence, but they were unavailable to testify at the previous revocation hearing. Our supreme court has stated that a new trial motion based on newly discovered evidence is the least favored ground. *See Wilcox v. State*, 342 Ark. 388, 39 S.W.3d 434 (2000). We will not reverse a denial of motion for a new trial based on newly discovered evidence absent an abuse of discretion by the circuit court. *Id.* In order to succeed on such

a motion, appellant must show that the new evidence would have impacted the outcome of the case, and that he used due diligence in trying to discover the evidence.

In support of his motion for a new revocation hearing, appellant submitted affidavits from Jason Ellenberger, Helen Tilghman, Richard Winters, and Joe Hammons. Appellant argued to the circuit court that the testimony of these individuals was crucial to corroborate both his testimony and that of Shannon Jachera that he did not have a firearm in his possession and that no gunshots were even fired on the day in question. The affidavits were from: (1) Ellenberger, who was with appellant during the confrontation, (2) and (3) Tilghman and Winters, neighbors who did not hear gunshots that day; (4) Hammons, who overheard McClendon at Tyler Ford state that he had been out on the property with a fifty-caliber black powder rifle scouting for deer, which would have constituted impeachment testimony related to McClendon's testimony that he had only an air rifle that day. Appellant contends that the circuit court erred in finding the that the evidence offered by the affiants had been presented to the court.

The State contends that these were not newly discovered witnesses. We agree. Appellant was aware of each of these potential witnesses prior to the revocation hearing, yet he neither subpoenaed them, requested a continuance to make sure they could be there, nor even mentioned the witnesses to the circuit court before or during the hearing. Additionally, neither his motion nor the affidavits offer any indication as to the witnesses' unavailability. The testimony of a known witness who was simply not subpoenaed fails to constitute "new evidence." *See Safley v. State*, 32 Ark. App. 111, 797 S.W.2d 468 (1990). Additionally, the

information in three of the affidavits, specifically those of Ellenberger, Tilghman, and Winters, would have constituted testimony that was merely cumulative or corroborative. Appellant had other witnesses who did testify at the hearing that he did not have a gun and did not fire any shots. Because the affiants' testimony would have done no more than duplicate testimony already before the circuit court, it would not have impacted the case and is yet another reason that the circuit court did not err in denying the motion for a new revocation hearing.

With respect to the testimony that would have been presented by Hammons, it is undisputed that it could have been used to impeach the testimony of McClendon regarding the type of gun he possessed and his reason for being on the property on the day in question. However, that was no more than a collateral issue because why the men were on the property is not relevant to appellant's conduct. Even if appellant had been unaware of this information until after the revocation hearing, the circuit court did not abuse its discretion in determining that he had failed to exercise due diligence in trying to discover it. Finally, newly discovered evidence that tends only to impeach other testimony that was presented before the court is not necessarily grounds for a new trial. *See Hicks v. State*, 327 Ark. 652, 941 S.W.2d 387 (1997). For all the above reasons, the circuit court's ruling denying appellant's motion for a new revocation hearing did not constitute an abuse of discretion. Accordingly, we affirm on this point as well.

Affirmed.

BIRD AND VAUGHT, JJ., agree.